In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 836

E. E. ROBERTSON, as representative of and on behalf of J. A. Behrends, Marko Dapcevich, Sam Dapcevich, Raymond C. Haydon, Boyd E. Marshall, Richard W. Marshall, Ernest McGilligan, Lynn E. Pope, E. E. Robertson, Emil Rundage, Hal Windsor and all other persons similarly situated,

Respondents (Appellants below),

vs.

ALASKA JUNEAU GOLD MINING COMPANY (a corporation),

Petitioner (Appellee below).

PETITION FOR REHEARING.

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BAY-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

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ALASKA JUNEAU GOLD MINING COMPANY (a corporation),
Petitioner (Appellee below).

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alaska Juneau Gold Mining Company, respectfully prays for a rehearing of the order of this

Court dated May 12, 1947, denying its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

NEW ACT OF CONGRESS NOW INVOLVED.

This is an action under the Fair Labor Standards Act for time and a half overtime and liquidated damages. Congress has just enacted a law signed by the President on May 13, 1947, commonly referred to as the "Portal to Portal" statute.

THE PERTINENT PROVISIONS OF THE ACT.

Congress in Part I of the Act makes certain findings and declares its policy in enacting the statute. These purposes are to abrogate "unexpected liabilities" arising under judicial interpretation of the Fair Labor Standards Act which, if allowed to stand, would constitute "a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce", and that "it is in the national public interest and for the general welfare," etc. "that this Act be enacted." The preamble concludes as follows:

> "It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

Part II of the Act makes its provisions expressly applicable to "existing claims."

The specific provision of the Act upon which this Petition for Rehearing is primarily based is Section 9 of Part IV which is as follows:

"Sec. 9. *Reliance on Past Administrative Rulings, Etc.*—In any action or proceeding *commenced prior to* or on or after *the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay* minimum wages or *overtime compensation under the Fair Labor Standards Act of 1938, as amended,* the Walsh-Healey Act, or the Bacon-Davis Act, *if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation,* of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. *Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.* (Italics supplied.)

(Note: The "Statement of the Managers on the Part of the House" accompanying the Conference Report says "that the administrative regulation, order, etc. does not have to be in writing.")

The Act contains other retroactive features which are applicable to the instant case, such as Part II, Sec. 3, relating to compromise of existing claims and Part IV, Sec. 11, relating to "Liquidated Damages", but we will not burden this Court at this time with a discussion of these features for, in our opinion, Sec. 9 is ground for a dismissal of the action and an affirmance of the trial Court's judgment to that effect.

FACTS.

The answer of this petitioner as defendant in the trial Court alleged as follows:

"III. *That calculating and paying to employees their basic wage and overtime wage on a daily basis was specifically and publicly approved* as in compliance with the provisions of the Fair Labor Standards Act *by Elmer F. Andrews, the then Administrator of the Federal Wage-Hour legislation and the Fair Labor Standards Act* (72) at a meeting held May 10, 1939, in Washington, D. C., of Congressmen from the mining states, which meeting was convened for the very purpose, among others, of discussing these wage-hour questions and which meeting was also attended by representatives of the mining industry, this defendant being there represented by H. L. Faulkner, one of its attorneys from Juneau, Alaska. That *said approval of the method of daily calculation of basis and overtime wages received wide circulation in the mining world* and a bulletin setting forth said Andrews' approval of such method was published on May 13, 1939, and widely distributed by the American Mining Congress, one of the leading and recognized mining organizations in the United States. (R. 34-5.)

IV. That on July 12, 1940, Baird Snyder, then *Chief Deputy of the Federal Wage-Hour Division,* wrote the Colorado Mining Association at Denver, Colorado, that *daily circulation (calculation) of overtime,* totaled at the end of the week, similar to the method followed by this defendant, *was permissible under the provisions of the Act.* (R. 35.)

V. That as a direct result and consequence of said interpretation of the Act by representatives of the Wage-Hour Division, as aforesaid, *such information* having *reached the employees of this defendant, said employees* considered it a distinct advantage to them to have their overtime calculated on a daily basis and in October, 1939, through their Union, they *insisted that this defendant change its wage schedule so that*

overtime would be computed daily instead of weekly, as was being done at that time. *Acting as a result of the insistence of said Union and relying on the aforesaid interpretation of the Act by the representatives of said Wage-Hour Division,* the then existing agreement between the Union and this defendant company was modified and *the company (73) began to pay its employees overtime on a daily calculated basis which, in the absence of said favorable opinion by said Administrator, it would not otherwise have done.*" (R. 35-36.)

The trial Court in its opinion held:

"Mr. Faulkner, the attorney for the company, conferred in Washington with Mr. Andrews, the then Administrator of the Wage and Hour Division, with (92) regard to the legality of such a plan. The Administrator stated publicly that such a plan was legal and authorized." (R. 45.)

* * * defendant's dealings with its employees were lawful and in good faith * * *" (R. 50.)

The Findings of Fact state:

"VIII. Mr. Faulkner, representing defendant, was in May, 1939, in Washington, D. C., and at a meeting of Congressmen and mine representatives heard Andrews, then Administrator of the Wage and Hour Division having charge of the administration of the Fair Labor Standards Act, state publicly that the split-day plan of paying wages was valid and in compliance with the Act, and Faulkner so advised this defendant." (R. 73.)

"* * * *Throughout, in dealing with its employes the defendant company has exercised good faith* and has made no attempt to coerce or force the men to enter into any agreements to their disadvantage." (R. 76-77.)

The following testimony of Mr. H. L. Faulkner, for defendant, appears in the Transcript of Record:

"* * * I went to Washington * * *. While there I attended a conference held between the administrator, Mr. Andrews, and nineteen congressmen and two or three other men at which an interpretation——

Q. Were there any mining men there?

A. Yes, four or five, besides the congressmen from the mining states—nine of them from the western mining states—and about five mining men, including some men from Nevada, Arizona——

Q. * * * *What did the administrator state at that meeting* in answer to a question by some person there, *as to whether the split day plan was authorized by the act, or not?*

A. *The administrator said that such a plan was legal and authorized.* * * *

A. The American Mining Congress put out a bulletin which was very widely circulated all over the United (180) States and Alaska, containing the results of this interview." (R. 116-117.)

This bulletin was introduced as Defendant's Exhibit A (R. 120) and which announced this interpretation of the Act by the then Wage and Hour Administrator.

A copy of the Deputy Administrator's letter to the Mining Association was also introduced as Exhibit J (R. 189) and the pertinent portion states:

"* * * our regulations * * * permit three methods of payment for overtime * * *

3. Pay it by any unit of time during the week *daily, that is, by the shift, by the day, or whatever daily unit of time you elect, and to add up all the overtime so paid, which you can then apply at the end of the week to the total overtime* due for the week. See paragraph 19 of Interpretative Bulletin No. 4." (R. 190-191.)

ARGUMENT.

Petitioner assigns the following reason for granting this petition for rehearing:

The testimony above quoted given at the trial establishes petitioner's pleaded defense that the then Administrator of the Wage and Hour Division had interpreted the Act to permit of daily credit of overtime and had specifically approved of such method of payment and that this petitioner had, in good faith, relied on this approval and interpretation and, in yielding to the demands and insistence of its employees that overtime be paid daily, acted in conformity with and in reliance on this administrative interpretation and ruling. The portion of the recent Act above quoted specifically relieves petitioner of any liability for any additional overtime wages and liquidated damages as claimed in this action.

THE RETROACTIVE FEATURES OF THIS REMEDIAL LEGISLATION ARE CONSTITUTIONAL AND VALID.

The rights of employees granted under Section 7 of the Fair Labor Standards Act are in the nature of public rights granted to effectuate a declared legislative policy and, therefore, may be taken away retroactively to effectuate a similar curative legislative policy.

This question of the constitutionality of the recent Act in so far as one of its primary objects is "to relieve employers from certain liabilities and punishments (both past and future) under the Fair Labor Standards Act" was carefully considered by Congress prior to the passage of the bill. There is nothing inherently unconstitutional in retroactive civil legislation. A vested property right may lawfully be abolished retroactively when Congress is exercising a power specifically conferred on it by the

Constitution. Rights of employees arising under Section 7 of the Fair Labor Standards Act are in the nature of public rights granted to effectuate a declared legislative policy and, therefore, *a fortiori,* can be taken away retroactively to effectuate a declared legislative policy.

A MERE REPEAL EVEN OF A STATUTE VOIDS RIGHTS SOUGHT TO BE EXERCISED UNDER THE STATUTE PRIOR TO REPEAL.

On this point, see:

Western Union Tel. Co. v. L. & N. Railroad Co., 258 U. S. 13;

Norris v. Crocker, 13 How. 429;

Maryland v. Baltimore & Ohio R. Co., 3 How. 534;

Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548;

South Carolina v. Gaillard, 101 U. S. 433 (1879);

Pearsall v. Great Northern Railway, 161 U. S. 646 (1896);

Gibbes v. Zimmerman, 290 U. S. 326 (1933);

Ogden v. Glackledge, 2 Cranch 272 (1804);

Ewell v. Daggs, 108 U. S. 143 (1883);

Morley v. Lake Shore Railroad Company, 146 U. S. 162 (1892);

Oshkosh Water Works Company v. Oshkosh, 187 U. S. 437 (1903);

Union Dry Goods v. Georgia P. S. Corp., 248 U. S. 372 (1919).

IN ITS RECENT STATUTE CONGRESS HAS SPECIFICALLY EXPRESSED DISAPPROVAL OF CERTAIN CLAIMS OF EMPLOYEES ARISING UNDER THE FAIR LABOR STANDARDS ACT.

Congress has plenary power to abrogate a private property right in furtherance of a legislative policy based on public interest.

The leading case is *Norman v. B. & O. R. Co.*, 294 U. S. 240, where Mr. Chief Justice Hughes held that gold clauses in private contracts were subject to the superior constitutional authority of Congress. See also *Louisville, etc. R. R. Co. v. Mottley*, 219 U. S. 467 and cases cited in both cases. In the foregoing cases the taking was retroactive and the parties were prevented from collecting what would otherwise have been due. Congress having the unquestioned power under the commerce clause to compel employers to establish work hours and to regulate wages for the benefit of employees in interstate commerce must necessarily have the concurrent and corollary power to take away those rights when Congress has found them to have been exercised in a manner burdensome to that commerce. In its recent Act there can be no doubt as to the intent of Congress on this point because that intent has been specifically expressed.

BECAUSE OF THE PUBLIC NATURE OF THE FAIR LABOR STANDARDS ACT, ITS PROVISIONS ARE NOT BINDING UPON A SUBSEQUENT CONGRESS.

The Fair Labor Standards Act has been upheld by this Court as an exercise "of plenary power conferred on Congress by the commerce clause", *U. S. v. Darby*, 312 U. S. 100.

It is similar to the police powers exercised by the states.

Hamilton v. Kentucky Distilleries Co., 251 U. S. 146;

Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 580.

Cases decided by this Court and holding that under the exercise of the police power the States may by legislation abrogate previously existing private rights are legion. The following are a few of the leading cases:

Boyd v. Alabama, 94 U. S. 645, 650;

Stone v. Mississippi, 101 U. S. 814, 817, 819;

Ewell v. Daggs, 108 U. S. 143, 151.

These last cited cases State statutes repealed rights arising under earlier State statutes.

See also,

Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375-6;

Sutter Butte Canal Co. v. Railroad Com., 279 U. S. 125, 138.

This Court has held that the right conferred by the Fair Labor Standards Act to collect overtime pay and liquidated damages is a civil penalty and "a statutory right conferred on a private party, but affecting the public interest" which may not be waived privately where such waiver "contravenes public policy."

Brooklyn Bank v. O'Neil, 324 U. S. 697, 704, 709, 711.

In the instant case the Appellate Court below has held in so many words that claims under the Act "are statutory rights which affect the public interest." (R. 211.)

It is axiomatic, and a principle overwhelmingly established by the many cases decided by this Court, a few of which only are above cited, that Congress has the equal power of abrogating such public statutory right, such abrogation to operate retroactively as well as prospec-

tively, where it has determined in no unmistakable terms by subsequent congressional enactment that the collection of such overtime pay and liquidated damages contravenes public interest. These rights are purely statutory and must fall if the statute on which they are based is specifically and intentionally modified to effectuate a legislative policy there clearly and unequivocally expressed. This new statute says in so many words that, when an employer has, in entering into a wage-hour agreement with its employees, relied in good faith on an interpretation by the administrative officer of the government, publicly expressed, that such method of wage payment is lawful, there may be no recovery by the employee. This is the very situation here presented.

PUBLIC INTEREST INVOLVED.

The instant case is probably the first, if not the very first, to come before this Court involving this important public question. Cases of similar import are pending all over the United States. President Truman, in signing the recent Act, in his accompanying message to Congress expressly approved of the main purpose of the Act but added that the effects "can be accurately measured only after interpretation by the Courts."

We here seek such interpretation and respectfully pray that this petition for a writ of certiorari be granted.

Dated, San Francisco, California,
May 24, 1947.

ALASKA JUNEAU GOLD MINING COMPANY,
Petitioner,

By WM. E. COLBY,
Counsel for Petitioner.

GEO. W. WILSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, WM. E. COLBY, counsel for petitioner, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and is presented in good faith and not for delay.

Dated, San Francisco, California,
May 24, 1947.

WM. E. COLBY,
Counsel for Petitioner.